

The respondent requests review of whether the claimant established just cause for her failure to provide notice within 10 days of her alleged injury. And even if there was just cause the respondent further argues that claimant provided notice on November 6, 2006, which is more than 75 days from August 23, 2006, the date respondent told the medical providers that she had been injured. Respondent also argues that claimant alleged a

single traumatic incident and complained of constant pain which is contrary to her assertion that she thought her condition would improve.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant began her employment as a secretary/parts manager with the respondent on August 15, 2005. Her job duties included accounts receivable and billing as well as inventory and distributing parts to customers. On August 23, 2006¹, the claimant was reaching for a piece of paper on the printer when she felt a pull or pop in her right shoulder.

Claimant testified:

Q. That the accident actually happened, you told her, on August 23rd, 2006, is that true?

A. And that is because I thought Thursday was the 23rd.

Q. But you did tell her that, correct?

A. That's correct.

Q. Okay, and so let's just talk about that. The next morning would have been Friday morning?

A. Um-hmm.

Q. Why didn't you tell Ian then?

A. He buzzed in and out and first he gave me the invoices and left, and there wasn't really time to say anything. It really – I really wasn't sure that it was nothing but a pulled muscle.

Q. You didn't have two seconds to say, "I hurt my shoulder"?

¹ Claimant alleged her injury occurred on August 24, 2006, but the preponderance of evidence indicates it occurred on August 23, 2006. In either event, notice on November 6, 2006, would be within 75 days.

A. Well, I didn't think about it. I'm not one that usually complains about aches and pains.²

Claimant sought chiropractic treatment on August 28, 2006, but sought no further treatment as she thought her shoulder would get better. Claimant testified her symptoms got worse through October 2006 and she still didn't say anything to her supervisor. On October 31, 2006, claimant sought treatment with Dr. Miller and described an onset of right shoulder pain two months ago while reaching for paper from a printer at work.

On November 6, 2006, claimant was advised that her last day of work would be November 30, 2006. Claimant contends that she sent an email on November 1, 2006, advising the respondent that she had injured her shoulder. Claimant does not have a copy of the email.

Adrian DeWaal, respondent's manager, testified:

Q. And after she clocked in and she came and sat down in your office, what did you tell her?

A. I told her that between me and Colby, we just decided there was too many glitches that we have to keep fixing and that she will be done at the end of the month.

Q. Did you tell her when her last day was going to be?

A. The 31st of November.

Q. What did she say in response to that?

A. She said okay, and she sat there a little bit and then she said, "I need you to know that I hurt my shoulder and I'm going to file a workman's comp claim."

Q. Before her saying that, after you told her she was going to be terminated, did she ever tell you or ever insinuate in any way that she had hurt her shoulder or hurt her shoulder on the job.

A. No, in fact, she'd sweep that whole office area every afternoon before she'd go home and she never complained or show any discomfort about her shoulder. She did tell me she didn't want to use a push mop because she thought it was hard on her back. She used a little broom to sweep that, and that action, you would think

² Nichols Depo. at 21-22.

that that would show up. She never asked me if there was anybody else that can do this because it's painful for her or nothing.³

Mr. DeWaal testified he found two emails on the computer that claimant had sent regarding her injury and both were dated November 6, 2006. Melissa Johnson, office manager, agreed that she had received an email dated November 6, 2006, from the claimant asking about workmen's comp papers.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer **within 75 days after the date of the accident** unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice. (Emphasis Added)

Initially, the respondent argues that notice was not provided within 75 days. The ALJ determined claimant suffered accidental injury on August 23, 2006, and the parties stipulated claimant first provided notice to respondent on November 6, 2006. This would calculate to notice on the 75th day after the date of accident. Consequently, the notice would be within 75 days as required by the statute.

Respondent next argues the claimant did not establish just cause for her failure to report the accident within 10 days. Claimant thought that her shoulder pain would improve and it was agreed that she was not a complainer at work. She initially sought chiropractic treatment and then went an extended period of time hoping her shoulder pain would improve. Finally in October 2006 she sought treatment for her persistent shoulder pain. It is significant to note that the history she provided the doctor regarding the onset of her pain was an incident reaching for paper on a printer at work. And this history was provided before claimant was aware that her employment was going to be terminated.

³ DeWaal Depo. at 11-13.

The claimant, a 77-year-old, was given an employee manual but was never personally advised by her supervisor, Mr. DeWaal, nor the office manager, Ms. Johnson, about the requirement to report accidents. Nor was she told to read or even where the posted Notice which explained the reporting requirements for injuries was located. And claimant testified that she never had read the Notice until after her claim was denied because it was posted in a back room above her eye level.

The claimant thought her shoulder problem would improve and she continued to work until the pain worsened and she sought treatment identifying the onset of her problems as an incident at work. Unaware of the reporting requirements she did not notify her supervisor of the accident until after she began to receive treatment. Although it is troublesome that she did not report the accident until after she was informed she was going to be terminated, nonetheless, she had provided the history of a work-related injury to the doctor and the physical therapy staff well in advance of being told she was to be terminated. Based upon the record compiled to date this Board Member finds there was just cause for claimant's failure to report the accident within 10 days and she did report the incident within 75 days. The ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated April 19, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2007.

BOARD MEMBER

c: Robert A. Anderson, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2006 Supp. 44-555c(k).